

No. 22-939

In the Supreme Court of the United States

ROBERT FRESE,

Petitioner,

v.

JOHN M. FORMELLA, in his Official
Capacity as Attorney General of the
State of New Hampshire,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

**BRIEF FOR INSTITUTE FOR FREE
SPEECH AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to securing the First Amendment rights of free speech, assembly, press, and petition. Along with scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. A core aspect of the Institute's mission is to protect free expression for political speech.

This case interests amicus because criminal libel laws imperil political speech.

SUMMARY OF ARGUMENT

The law of criminal libel has long raised fear of political persecution. The mere threat of prosecution may cause speakers to trim their speech, and prosecutions, even if ultimately dismissed or overturned on appeal, can cause long-lasting injuries. Despite these worries, this Court has never held criminal libel repugnant to the First Amendment. It should now do so.

This Court has stated that the perceived long-standing common-law pedigree of criminal libel insulates it from First Amendment scrutiny. That pedigree, however, is mistaken. It reflects, at best, Sir

¹ No person other than amicus and its counsel has authored any part of this brief or made any monetary contribution intended to fund its preparation or submission. Both parties' counsels of record received notice of amicus's intention to file this brief at least ten days before its due date.

Edward Coke's mistaken view of legal history and at worst his intentional creation of a myth to defend and extend the Star Chamber's reach. In any event, public backlash to the Alien and Sedition Acts shortly after the Founding shows that the American people repudiated this view of the common law whatever its historical warrant.

They did so for good reason. Criminal libel functions as seditious libel and allows public officials to punish people who criticize them. The mere threat of criminal prosecution can deter valuable speech, and actual prosecutions can harm those prosecuted even if the charges are ultimately dismissed or overturned on appeal.

Recent, real-life criminal prosecutions demonstrate these dangers. They show public officials bringing the full brunt of criminal prosecution upon those who have dared to criticize them. Officials have found the tool irresistible, and current leaders in both authoritarian and democratic regimes regularly employ it.

This Court should recognize that criminal libel endangers core political speech and is incompatible with the First Amendment.

ARGUMENT

I. Criminal libel, an instrument of the Star Chamber, was originally unknown to the common law.

This Court has viewed criminal libel as presumptively constitutional, believing that “[t]he law of criminal libel rests upon th[e] secure foundation” of

the “common[]law.” *Near v. Minnesota*, 283 U.S. 697, 715 (1931) (dictum). But this perception of criminal libel as a long-standing, traditional common law crime is mistaken. Criminal libel law owes its origins not to the common law, but rather to the Star Chamber. In sixteenth-century England, the Star Chamber assumed jurisdiction of criminal libel from the disappearing ecclesiastical courts and dramatically repurposed it. Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 *Comm’n L. & Pol’y* 433, 448 (2004). No longer did criminal libel focus broadly on protecting morality, punishing “sin,” and preventing breaches of the peace. See *id.* at 445. It became instead the method by which English noblemen and public officials silenced their critics. *Id.* at 448.

This turn to the Star Chamber was unsurprising. Because criminal libel was unknown to the common law, public officials seeking a weapon more potent than civil defamation needed a tribunal with “practically unlimited authority,” tasked with remedying wrongs “which could not be effectively remedied by the ordinary courts of law.” Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 *Colum. L. Rev.* 546, 562 (1903). The Star Chamber fit this bill. It “disregarded forms,” was “bound by no rules of evidence,” and “appointed and heard only its own counsel.” *Id.* at 563.

Punishment was quick and severe. Lisby, 9 *Comm’n L. & Pol’y* at 448. Consider Dr. Alexander Leighton, whom the Star Chamber convicted of criminal libel in 1630. *A Brief Account of Archbishop*

Laud's Cruel Treatment of Doctor Leighton, in George Benson, *A Collection of Tracts* 213, 219-220 (3d ed. 1748). Leighton was arrested for publishing a book that was highly critical of the Queen and of several bishops—in particular, Archbishop Laud. *Id.* at 216. The Star Chamber imposed a sentence upon Leighton so cruel that, years later, members of the Long Parliament were moved to tears when Leighton recounted his sufferings to them. *Id.* at 224. Leighton was hauled to the pillory and whipped; he then had one of his ears cut off and one side of his nose slit. *Id.* at 221. Leighton was also branded on each cheek with an “S” to label him forever a “Sower of Sedition.” *Id.* After spending several days in prison, he was again taken to the pillory where he was whipped, his other ear cut off, and the other side of his nose split. *Id.* He was then returned to prison for a life sentence. *Id.*

The Star Chamber similarly punished William Prynne, who was convicted of seditious libel for publishing a book critical of the King. See *Documents Related to the Proceedings Against William Prynne, in 1634 and 1637*, at 1-28 (Samuel R. Gardiner ed., 1877). It divested Prynne of his university degree, expelled him from the Inns of Court, and forced him to stand in the pillory wearing a sign declaring his book libelous. *Id.* at 17, 20-21, 25. The Star Chamber then not only burned his book publicly at the pillory, but also cut off both his ears and threw him into prison. *Id.*

After hearing such evidence, the Long Parliament abolished the Star Chamber in 1641 because it had “undertaken to punish where no law doth warrant, and to make decrees for things having no such

authority, and to inflict heavier punishments than by any law is warranted.” The Act for the Abolition of the Court of Star Chamber, July 5, 1641, *reprinted in The Constitutional Documents of the Puritan Revolution, 1625-1660*, 179, 181 (Samuel Rawson Gardiner ed., 3rd ed. rev. 1899). Criminal libel should have disappeared along with the Star Chamber, as common law courts at the time did not have jurisdiction over the crime. Veeder, 3 Colum. L. Rev. at 563. But whether through accident or historical falsification, criminal libel managed to survive.

The notion that criminal libel has roots in the common law comes from Sir Edward Coke, a key architect of criminal libel law during his tenure as Attorney General for Elizabeth I. Philip A. Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 Stan. L. Rev. 661, 692-693 (1985). But Coke’s grounding was mistaken. In his comment to “The Case *de Libellis Famosis*,” Coke offered a brief treatise on the law of criminal libel and claimed it *could* be prosecuted either in the Star Chamber or at common law. See (1606) 77 Eng. Rep. 250, 250 (Star Chamber); see also Irving Brant, *Seditious Libel: Myth and Reality*, 39 N.Y.U. L. Rev. 1, 5 (1964). Yet he did not claim criminal libel had ever been prosecuted at common law and “he evidently knew of no such trial.” Brant, 39 N.Y.U. L. Rev. at 4. Twenty-two years later, in his *Third Institute*, Coke purportedly discovered common law origins for criminal libel: two prosecutions in the King’s Bench in 1334 and 1344. See Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* 174 (London,

W. Clarke & Sons 1817); Brant, 39 N.Y.U. L. Rev. at 7. Yet neither was a prosecution for criminal libel; one was for treason and the other was for contempt of court. See *id.* at 7-8.

Later common law judges, “hostile to personal freedom in an era of universal and savage intolerance,” readily endorsed Coke’s unsupported assertion about criminal libel to enable their punishment of government critics. Brant, 39 N.Y.U. L. Rev. at 11-12. And they used this authority, rendering the press far from free:

Writers in the service of rival factions had to brave the vengeance of their political foes. * * * They could expect no mercy from the courts, or from Parliament. Every one was a libeler who outraged the sentiments of the dominant party. The Commons, far from vindicating public liberty, rivalled the Star Chamber in their zeal against libels.

2 Thomas Erskine May, *The Constitutional History of England Since the Accession of George Third* 107 (1863).

Common law judges imported the Star Chamber’s harsh procedures into their own courts and pushed the law of criminal libel still further, inspiring outrage from free speech advocates in England. See Hamburger, 37 Stan. L. Rev. at 725-753. Lord Chief Justice Holt, for example, expanded the range of conduct for which one could be found guilty of criminal libel, holding that the mere *writing* of a libel without intent to publish could be found criminal. *Id.* at 729-

730. Perhaps understanding this holding rested on “no plausible precedents,” *Id.* at 731, Holt justified his expansion with general policy concerns, emphasizing that “if it Should be no Crime to Write Libels, the Government & Magistrates, must be Exposed to the Malice & Discontents of Disaffected persons.” *Id.* at 732 (quoting *Rex v. Bear*, British Library, Hardwicke Papers, Add. M.S. 35981, at 16 (1699)). Consistent with this sentiment, Holt pressed the doctrine even further, holding that criticism of the government in general, rather than criticism of individual government officials, could be criminal. See *Tuchin’s Case* (1704) 90 Eng. Rep. 1133, 1133-1134 (KB); Hamburger, 27 Stan. L. Rev. at 735. Holt also drastically restricted the province of the jury by requiring the alleged libels to be stated only in Latin, thus leaving the question of whether the writing was defamatory in the hands of judges. *Id.* at 737-738. Thus, Holt took a body of law with a fictional past and made it more potent still, believing “[i]f men should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist.” *Tuchin’s Case* 90 Eng. Rep. at 1133-1134. Not until the enactment of Fox’s Libel Act in 1792 did the jury regain authority in libel actions. Hamburger, 27 Stan. L. Rev. at 738; Fox’s Libel Act, 32 Geo. 3 c. 60 (Eng.).

Blackstone endorsed the mythical common law origins of criminal libel, see 4 William Blackstone, *Commentaries* 150-153 (1769); see also Lisby, 9 Comm’n L. & Pol’y at 451, but his claims did not go unchallenged. Contemporary critics saw that “our

ancient law knew of none but a civil remedy * * *’ and charged that seditious libel was but ‘the mere fabrication of the professors [Blackstone] and officers of the law . . . never ratified by the Parliament, the people of England, nor any part of the ancient common law.’” William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 108 (1984) (second and third emendations in original) (quoting Irving Brant, *The Bill of Rights: Its Origin and Meaning* 217 (1965)). Armed with a fictional past, criminal libel, a weapon of a monarchy intent on silencing political dissidents, made its way to the American colonies.

The young nation’s judges upheld criminal libel laws in the face of state and federal free speech guarantees, causing “considerable controversy” at the time. John Kelly, *Criminal Libel and Free Speech*, 6 U. Kan. L. Rev. 295, 311 (1958). Even though these judges had witnessed the backlash to the Alien and Sedition Acts, their training led them to accept two premises—the first now discredited and the second wholly mistaken—that together insulated criminal libel from state and federal constitutional challenge. The first, that “constitutional provisions were only declaratory of the English common law,” *id.* at 311, caused them to carve out from constitutional prohibition anything the common law had long accepted. The second, the English fiction that criminal libel had common law origins, wrongly placed criminal libel among the carve-outs. Together these two beliefs protected criminal libel. And many American courts today continue to

follow Coke's false mythology rather than the text of the First Amendment and its original public meaning.

II. Criminal libel is repugnant to the original understanding of the Free Speech Clause.

A. The backlash to the Alien and Sedition Acts reveals the Free Speech Clause's original public meaning.

In the American colonies, criminal libel was an "active doctrine." John Kelly, *Criminal Libel and Free Speech*, 6 U. Kan. L. Rev. 295, 305 (1958). Yet as Americans began to endorse broad individual rights, dissatisfaction with the doctrine and a monarchy which embraced it intensified. During the ratification debates, it became clear the American public believed the nascent federal government lacked the power to suppress speech critical of it. See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 125-126 (1984). Yet just nine years after the ratification of a constitution guaranteeing freedom of speech, the Adams Administration enacted the Alien and Sedition Acts in an effort to suppress its press critics and its Jeffersonian opponents. *Id.* at 123. The Acts criminalized writing, publishing, or speaking anything "false, scandalous and malicious" against the federal government "with intent to defame * * * or to bring them * * * into contempt or disrepute * * * or to stir up sedition within the United States." Sedition Act, ch. 74, 1 Stat. 596 (1798). The Acts were selective in their scope, protecting only incumbents, but not Vice President Jefferson, from criticism, and were

“vigorously, but selectively, enforced by the Federalist Party against its political opposition.” See Mayton, 84 Colum. L. Rev. at 124. Interestingly, because the Acts permitted truth as a defense, they offered accused libelers more protection than did the English doctrines. See Kelly, 6 U. Kan. L. Rev. at 313. But the American public immediately and vehemently objected to them, showing that Americans understood freedom of speech to allow them to criticize government, and that they would not tolerate even so-called “common law” restrictions on that freedom. See Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 Comm’n L. & Pol’y 433, 459 (2004).

James Madison endorsed this view. In attacking the Acts’ constitutionality, he argued that criminal libel was contrary to the constitutional structure. “[T]he executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both, being elective are both responsible.” Mayton, 84 Colum. L. Rev. at 126-127 (quoting James Madison, *Report Accompanying the Virginia Resolution*, reprinted in 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 570 (J. Elliot ed., 1866)). To Madison, it was “natural and necessary . . . that a different degree of freedom in the use of the press should here be contemplated” in the United States as opposed to England. *Id.* at 127 As he drafted the First Amendment, Madison’s words carry particular force. *Id.* at 97.

B. Criminal libel functions as seditious libel, enabling public officials to punish their critics.

Public officials' use of criminal libel to punish public criticism functions as seditious libel. See Robert A. LeFlar, *The Social Utility of the Criminal Law of Defamation*, 34 Tex. L. Rev. 984, 1032 (1956). While many believe criminal libel laws are antiquated and rare, seventeen states maintain them, see Jane E. Kirtley & Casey Carmody, *Criminal Defamation: Still "An Instrument of Destruction" in the Age of Fake News*, 8 J. Int'l Media & Ent. L. 163, 166 (2020), and their use has been "showing a resurgence," see Matthew L. Schafer & Jeff Kosseff, *Protecting Free Speech in a Post-Sullivan World*, 75 Fed. Commc'n L.J. 1, 33 (2022).

"[C]ases reveal[] that in recent years there has been a tendency to use criminal libel to attain ends theoretically foreclosed by the absence of seditious libel." Lisby, 9 Commc'n L. & Pol'y at 482 (citation omitted). Public officials who initiate criminal libel prosecutions are "more likely to target outspoken individuals" and "are able to utilize criminal complaints as a means to empower law enforcement officials to search homes and seize property, which, in turn, is a way to intimidate and silence critics." Kirtley & Carmody, 8 J. Int'l Media & Ent. L. at 167. The trend in politically motivated prosecutions is "one of the 'ins' prosecuting the 'outs,' of the winner prosecuting the loser. * * * [S]uccessful prosecutions were, for the most part, for statements of a sort likely

to have been unpopular at the time and place they were made.” LeFlar, 34 Tex. L. Rev. at 1032.

Southern states, for example, used criminal libel during the Civil Rights Movement to suppress the speech of segregation opponents. See LeFlar, 34 Tex. L. Rev. at 1032-1033. One study examining cases from 1990-2002 found that 52.17 percent of threatened or actual criminal libel prosecutions were “political prosecutions,” and that another 34.78 percent involved public figures or matters of public concern. See Lisby, 9 Comm’n L. & Pol’y at 467 (citation omitted); see also LeFlar, 34 Tex. L. Rev. at 985 (finding that nearly half of criminal libel prosecutions between 1920 and 1955 could be classified as political prosecutions).

“Fining men or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it.” *Garrison v. Louisiana*, 379 U.S. 64, 80 (1964) (Black, J., concurring). Indeed, criminal libel punishes innocent speakers even if the court dismisses a prosecution. Officials will have likely compromised their victims’ privacy by searching their homes, cellphones, and computers and subjected them to shame by arresting them. See Kirtley & Carmody, 8 J. Int’l Media & Ent. L. at 189 (“[M]any criminal defamation complaints are dismissed or dropped before a formal trial on the charges can take place, though journalists are still subject to searches, arrests, and imprisonment while the charges are still under consideration.”). And if a higher court overturns a criminal conviction, the defendant will have lost much

time and money in defense and will have endured the stigma and stress of a criminal conviction.

Arrests, even if dropped, may have lasting consequences. A person may have to report the arrest on applications for jobs, schools, and leases. See, e.g., *Conducting Background Investigations and Reference Checks*, Soc’y for Hum. Res. Mgmt., <https://perma.cc/78MY-C49F> (finding that eighty-three percent of employers conduct a criminal history check during the hiring process); Josh Moody, *Ban the Box: Opening the Door to College for Felons*, U.S. News & World Rep. (Jan. 17, 2020), <https://perma.cc/2B6U-F38C> (finding seventy percent of four-year colleges ask applicants to report their criminal history); TransUnion SmartMove, *TransUnion Independent Landlord Survey Insights* (Aug. 7, 2017), <https://perma.cc/TS4V-8J4D> (“90% [of landlords s]ay they run credit and criminal background checks on all applicants.”). Even an acquittal may not automatically lead to expungement of an arrest record. Arrestees may have to file additional petitions with the court and demonstrate “manifest injustice” to have their record expunged. See *Virginia Circuit Court Form CC-1473, Instructions for Petition for Expungement Filed in a Circuit Court — Acquittal/Dismissal*, <https://perma.cc/W5LL-BJZN>. In addition, many professional licensing applications, such as state bar applications, require applicants to report arrests and court proceedings that *are* expunged from their record. See, e.g., Lydia Johnson, *The Illusion of a Second Chance: Expunctions Versus the Law School and State Bar Application Process*, 9 Fla. A&M U. L. Rev. 183,

186 (2013) (“Many state bar associations will compare responses to the disclosure question with the responses given during law school admission. * * * Both questions generally will request expunged records.”).

Criminal libel laws, therefore, chill speech even when prosecutions ultimately fail. See Kirtley & Carmody, 8 J. Int’l Media & Ent. L. at 193-194; see also Lisby, 9 Comm’n L. & Pol’y at 482 (“The impact of criminal law is ‘felt not only by those convicted,’ but also by those who are ‘merely prosecuted’ or ‘threatened with prosecution,’ and by ‘countless others’ who cannot ‘accurately judge the boundaries imposed on freedom or who [are] fearful to take the risk.’”). The mere possibility of such consequences threatens journalists and other advocates, potentially chilling their free speech and limiting press freedoms. Because of the power asymmetry between individuals and the state, moreover, criminal libel laws have a more powerful chilling effect than do civil libel laws. Private parties, after all, cannot search the defendant’s home and belongings, seize them, and arrest the defendant before trial begins. *Id.* at 486 (“Though the crime of libel today may indeed be ‘a largely unenforceable offense,’ that has not stopped those who would use its sledgehammer effect—or the threat of its use—to try to control speech, even in the face of eventual failure.”).

III. Officials' use of criminal libel to stifle political and social criticism continues today.

Statistics cannot fully capture the human impact of criminal libel prosecutions. A few examples of the doctrine's application illustrate just how disruptive and chilling these prosecutions can be in punishing Americans for exercising their First Amendment rights.

1. One of the most renowned criminal libel cases in American history arose from President Theodore Roosevelt's zealous quest for vengeance against Delevan Smith of the *Indianapolis News* and Joseph Pulitzer of *The New York World*. The pair incensed Roosevelt by writing articles alleging possible corruption in the Panama Canal Zone's acquisition, suggesting that Roosevelt's relatives and friends had profited from the deal. Clyde Peirce, *The Panama Libel Cases*, 33 *Ind. Mag. Hist.* 171, 171-181 (1937). Roosevelt issued a message to Congress saying he would have the publishers prosecuted, charging that the stories "were scurrilous and libelous in character and false in every particular," "need[ed] no investigation whatever," and were "in fact wholly, and in form partly, a libel upon the United States Government." Theodore Roosevelt, *Message to the Senate and House of Representatives, Dec. 12, 1908*, in *H. Journal*, 60th Cong., 2d Sess. 72, 72 (1908). According to President Roosevelt, "It should not be left to a private citizen to sue Mr. Pulitzer for libel. He should be prosecuted for libel by the governmental authorities." *Id.*

The *World* responded righteously, condemning the message for its emotional falsities and charging that Roosevelt, “in the absence of law, officially proposes to use all the power of the greatest government on earth to cripple the freedom of the press on the pretext that the Government itself has been libelled—and he is the Government.” Frank Irving Cobb, *Lese-Majesty*, N.Y. World, Dec. 16, 1908, reprinted in John L. Heaton, *Cobb of “The World”: A Leader in Liberalism* 8, 9 (1924). The *World* then went further, writing that “[n]o other living man ever so grossly libelled the United States as does the President,” as he “besmirches Congress, bulldozes Judges, assails the integrity of courts, slanders private citizens, and * * * has shown himself the most reckless, unscrupulous demagogue whom the American people ever trusted with such great power and authority.” *Id.* at 11.

A grand jury convened shortly thereafter. Peirce, 33 Ind. Mag. Hist. at 183. Because no federal libel statute existed, the men were indicted under a “fantastic interpretation” of an 1898 act to “protect the harbor defenses and fortifications constructed or used by the United States from malicious injury, and for other purposes.” *Id.*; see Assimilative Crimes Act, ch. 576, s. 2, 30 Stat. 717, 717 (1898). Contemporary American legal journals lambasted Roosevelt for seeking to revive the doctrine of seditious libel, which they thought had died with the Alien and Sedition Acts. See *The Action of the Government Against The New York World as a Revival of the Offense of Scandalum Magnatum*, 68 Cent. L.J. 135, 135 (1909) (condemning the prosecutions as erroneously based on

English understandings of seditious libel that had been rejected by the American colonies); James M. Kerr, Letter to the Editor, *The World Libel*, 68 Cent. L.J. 253, 254 (1909) (calling the prosecutions “a dangerous and an unnecessary precedent—a rolling back of the wheels of time and the development of society”).

The Act provided that a person who violated state criminal law on federal land could be tried in federal court. Assimilative Crimes Act, ch. 576, s. 2, 30 Stat. 717, 717 (1898). On this theory, a newspaper libel mailed to several states could be subject to prosecution in every federal district where a post office had received it. See Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 Fordham L. Rev. 263, 291 n.177 (1986) (citing *United States v. Press Publ'g Co.*, 219 U.S. 1, 4-6 (1911)). In contrast, many states, including New York, maintained single-suit statutes which permitted only one criminal action for libel to be filed anywhere in the country. *Id.* “Roosevelt’s lawsuit was a clear attempt to evade New York law and to create a chilling effect through the threat of multiple prosecutions.” *Id.*

The government lost both cases. In discharging the *News* defendants, the court warned of the dangers of a government being able to prosecute criminal libel in almost any federal courtroom in the nation. *United States v. Smith*, 173 F. 227, 232 (D. Ind. 1909) (“If the prosecuting officers have the authority to select the tribunal, if there be more than one tribunal to select from, if the government has that power, and can drag citizens from distant states to the capital of the nation,

there to be tried, then * * * this is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial.”). Roosevelt later called the judge a “jackass and a crook.” Peirce, 33 *Ind. Mag. Hist.* at 185.

The *World* case reached this Court, which held the Assimilative Crimes Act provided no cause of action for state criminal libel. See *Press Publ’g Co.*, 219 U.S. at 16. This represented a decisive victory for Pulitzer since New York’s single-suit provision barred the government from prosecuting the alleged libels in any other court. Gibson, 55 *Fordham L. Rev.* at 292.

2. Teddy Roosevelt’s pursuit is no anachronism. In 2015, police arrested Anne King for defamation and held her in jail for five and a half hours before her release on bail, even though defamation is not a crime in Georgia. Eugene Volokh, *Criminal Libel Prosecution—Under a Statute Struck Down 30 Years Before*, *The Volokh Conspiracy* (Sept. 21, 2018), <https://perma.cc/6W58-AWSS>. King’s supposed offense—a Facebook post stating, “[t]hat moment when everyone in your house has the flu and you ask your kid’s dad to get them (not me) more Motrin and Tylenol and he refuses.” *Id.* The post referred to her ex-husband, Captain Corey King, an officer in the local sheriff’s department. *Id.* Anne took the post down to appease Captain King, but he still felt “disrespected” and initiated a criminal complaint leading to her investigation and arrest. Christian Boone, *Legal Win for Ga Woman Arrested After Facebook Post About Ex-Husband*, *The Atlanta J.-Const.* (Oct. 23, 2019), <https://perma.cc/PGS7-MGDK>. Five days later, Anne

was taken before a magistrate judge, who told her that she had “defamed her ex-husband’s character” and ordered her not to contact him. *Id.* The magistrate then threatened to ban her from Facebook and set her bond at \$1,000. *Id.* Three months later the charges were dismissed because the Georgia Supreme Court had struck down Georgia’s criminal defamation statute in 1982. See *Williamson v. State*, 295 S.E.2d 305, 306 (Ga. 1982). Despite this, the prosecutor still defended the charges, claiming that “just because something is legal does not make it right.” Boone, *The Atlanta J.-Const.*, <https://perma.cc/PGS7-MGDK>.

3. Jim Fitts was the editor and publisher of *The Voice*, a weekly South Carolina newspaper. He published a column headlined, “My Vote Is Not for Sale,” which accused unnamed legislative representatives of “participat[ing] in ‘corrupt dealings’” and stealing “during their time in power.” *Fitts v. Kolb*, 779 F. Supp. 1502, 1505 (D.S.C. 1991). Local legislators running for re-election believed the column damaged their reputations and filed a criminal complaint against Fitts, who was arrested on two counts of criminal libel. *Id.*

Fitts spent eight hours in jail before receiving a hearing, at which the magistrate set bond at \$40,000—eight times the maximum statutory amount. *Fitts*, 779 F. Supp. at 1505. Fitts remained in jail for two days, until his bond was changed to \$30,000. Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 *Comm’n L. & Pol’y*, 433, 467-468 (2004). As a condition of his release, the court ordered Fitts not to write or talk about his

arrest. *Fitts*, 779 F. Supp. at 1506. After both legislators won their primary races a few months later, a grand jury indicted Fitts on two counts of criminal libel. Lisby, 9 Comm'n'c L. & Pol'y at 469. The legislators, however, then requested that the charges be dropped. *Id.* Their attorney said “the charges had achieved their objective * * *. The purpose behind them ‘was not so much as punish [Fitts as to serve as] a deterrent.’” *Id.* at 470 (second alteration in original).

4. University of Northern Colorado student Thomas Mink launched a newsletter called *The Howling Pig*, intended to, in the words of its fictional editor, “speak truth to power, obscenities to clergy” and act as a “forum for the pissed off and disenfranchised in Northern Colorado, basically everybody.” *Mink v. Knox*, 613 F.3d 995, 1008 (10th Cir. 2010). Mink wrote pieces under the pseudonym “Junius Puke” and included an altered photo of professor Junius Peake, meant to “spoof[] and parod[y] Professor Peake.” *Mink v. Suthers*, 482 F.3d 1244, 1249 (10th Cir 2007) (alterations in original).

Peake filed a police complaint alleging criminal defamation. *Mink*, 482 F.3d at 1249. Police searched Mink’s residence and seized his computer. Officers told Mink he was in “big trouble” and that “resuming publication of *The Howling Pig* would only ‘make things worse for [him].’” *Id.* (alteration in original). After the search, Mink retained a lawyer who was told by the officer that he “plan[ned] to recommend that criminal libel charges be filed against Mink.” *Id.* at 1250. Mink’s attorney argued to the district attorney that charging his client would violate the First

Amendment and requested that Mink's belongings be returned. The district attorney never responded. *Id.*

Mink then filed suit in federal court, seeking declaratory relief that prosecuting him would violate the First Amendment. *Mink*, 482 F.3d at 1250. At a status hearing, the district attorney told Mink he would not prosecute him. *Id.* In large part because of the negative publicity surrounding the case, Colorado later repealed its criminal libel laws. Int'l Press Inst., *Colorado Repeals Criminal Libel Law*, ifex (Apr. 20, 2012), <https://perma.cc/JC89-FAV8>.

5. In 2019, police in New Orleans arrested former police deputy Jerry Rogers for criminal libel. Faimon A. Roberts III, *Judge Rules Arrest of Agent for Defamation in Nanette Krentel Death Investigation Was Illegal*, Nola.com (May 16, 2022), <https://perma.cc/Q3AP-2PL6>. Rogers' alleged "crime" was sending anonymous emails to the sister of a murder victim, alleging that police had botched the investigation. *Id.*

The investigation concerned the murder of Nanette Krentel, whose body was found in the burned debris of the home she shared with her husband in July, 2017. Faimon A. Roberts III, *Judge Rules Arrest of Agent for Defamation in Nanette Krentel Death Investigation Was Illegal*, Nola.com (May 16, 2022), <https://perma.cc/Q3AP-2PL6>. At the time, Krentel's husband was a fire chief. *Id.* The Krentel case, which has yet to be solved, received enormous media scrutiny and was a contentious issue in the 2019 sheriff's race. *Id.* The incumbent, Sheriff Randy Smith, ultimately

won that election, but he fielded questions and accusations about his department's handling of the Krentel murder throughout the campaign. *Id.* Smith's deputies traced the emails to Rogers and arrested him for criminal defamation even though the district attorney's office advised them that Louisiana's Supreme Court had long held the criminal defamation statute unconstitutional. *Id.* The trial court dismissed the case, *id.*, which is currently on appeal.

6. Authoritarian regimes across the world frequently use criminal libel to silence critics and opposition. See, e.g., Michael Beltran, *Calls to End Criminal Libel in Philippines After Critic Arrested*, Al Jazeera (Aug. 11, 2022), <https://perma.cc/P3W6-7WR3> (discussing the use of criminal libel laws in the Philippines to silence opponents and activists); Kathy Short, *Zambian Opposition Leader Charged with Criminal Libel, Hate Speech*, VOA (Nov. 2, 2022), <https://perma.cc/TRX9-5966> (noting the arrest of an opposition leader in Zambia for criticizing a government official); Henry Bodkin, *Gordon Brown's Sister-in-law Who Exposed Malaysia Scandal Fears International Arrest*, The Telegraph (Oct. 2, 2021), <https://perma.cc/PCA2-GU2S> (discussing the potential arrest of a journalist who exposed rampant corruption in the Malaysian government); *Uganda Urged to Free Two Journalist [sic] Held Since Last Week on Libel Charges*, Reps. Without Borders (June 4, 2021), <https://perma.cc/G26Q-LSHV> (noting how Uganda's government uses criminal libel to target journalists); Hannah Beech, *Woman Is Sentenced to 43 Years for Criticizing Thai Monarchy*, N.Y. Times (Jan. 19, 2021),

<https://perma.cc/95TG-R9KZ> (discussing how human rights groups say Thailand is using libel laws to target critics).

Russia, in particular, has increasingly used criminal libel laws to silence government critics and President Putin's opponents. Russian authorities have launched a "witch hunt" to "prosecute anti-war protestors" since Russia invaded Ukraine in 2022. *Russia: Authorities Launch Witch-Hunt to Catch Anyone Sharing Anti-War Views*, Amnesty Int'l (Mar. 30, 2022), <https://perma.cc/F7MD-9YUG>; see also *Fugitive Russian Father Convicted of Insulting Army Detained in Belarus*, Reuters (Mar. 30, 2023), <https://perma.cc/TF3Q-GKTF> (detailing how a Russian man's twelve-year-old daughter drawing anti-war pictures at school led authorities to investigate him, which resulted in the man being convicted of posting anti-war comments on social media, being sentenced to two years' imprisonment, and having his daughter taken away and placed in a children's home). Alexei Navalny, a Kremlin critic and opposition leader repeatedly targeted by the regime, has been charged with criminal libel in an attempt to "silence him and intimidate his supporters" after he criticized a war propaganda video. Robyn Dixon, *Navalny Dismisses Libel Case Against Him as 'Nonsense' in Third Day of Russian Trial*, Wash. Post (Feb. 16, 2021), <https://perma.cc/4RPY-GLRW>.

7. Western democracies also demonstrate the dangers that criminal libel poses to dissent. Italy, for example, has repeatedly targeted world-renowned journalist and human rights activist Roberto Saviano

with charges of criminal defamation. In 2019, the government charged him with criminally defaming the deputy prime minister when he urged investigation into the official's possible mafia connections. Ed Vulliamy, *Italy's PM Meloni Sues Gomorrah Writer in Libel Drama over Refugee Rescue*, *The Guardian* (Nov. 13, 2022), <https://perma.cc/ZY8Y-LE3Q>. And in 2022, the government charged Saviano with criminal defamation for criticizing Prime Minister Giorgia Meloni's policy of not rescuing seaborne migrants in danger of drowning and of targeting NGOs who did rescue them. See *id.* After a migrant baby drowned off the coast of Italy, Saviano recognized that the government's general policy of opposing immigration was legitimate: "[The government] ha[s] a policy, legitimately, which opposes * * * reception [of migrants]." *Id.* (fourth alteration in original). "[B]ut," he added, "surely not in the case of an emergency in mid-sea." *Id.* How, he asked, "is [Meloni's policy] thinkable?" *Id.* If convicted, Saviano faces up to three years in prison. *Id.*

In the wake of recent civil unrest in France opposing unpopular pension reforms, prosecutors have targeted critics of President Macron with charges of "insulting the president," akin to criminal libel. *French Woman Faces Trial, €12,000 Fine for 'Insulting' Macron on Facebook*, *France 24* (Mar. 29, 2023), <https://perma.cc/7WRF-HPEQ>. One woman in northern France was arrested and held in custody for calling Macron "filth" in a Facebook post about a television address he gave. *Id.* She will stand trial in

June and faces up to twelve-thousand euros in fines.
Id.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2023